
CANADA / JUDGMENT

R. v. Hagen

2021 BCCA 68

COURT

British Columbia Court of Appeal

DECIDED

16 February 2021

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2021 BCCA 68 R. v. Hagen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hagen,

2021 BCCA 68

Date: 20210216

Docket: CA47236

Between:

Regina

Respondent

And

Mike Christopher Hagen

Appellant

Restriction on publication: Section 16(4) of the Sex Offender Information and Registration Act [SOIRA]. This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated November 20, 2020 (R. v. Hagen, Prince Rupert Dockets 29937-3 and 29937-4-A).

Counsel for the Appellant:

B.R. Anderson

J. Dawkins, Articled Student

Counsel for the Respondent:

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

February 5, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 16, 2021

Summary:

Bail granted on an appeal from a ten-month sentence imposed on a charge of possession of child pornography.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Mike Christopher Hagen applies for leave to appeal and for bail pending the determination of his appeal from sentences imposed on him on charges of possession of child pornography and breach of a bail condition. On the child pornography charge he was sentenced to ten months' imprisonment to be followed by three years' probation and a 20-year prohibition order made pursuant to s. 161 of the Criminal Code, R.S.C. 1985, c. C-46. On the breach charge, he was sentenced to 30 days' imprisonment (concurrent).
- [2] The principal relief Mr. Hagen seeks is an order substituting a conditional sentence order ("CSO") for the ten-month term of imprisonment. In the alternative, he seeks a reduction in the ten-month term. Mr. Hagen has served approximately two and one half months of that sentence. He did not apply for bail sooner because of the time it took him to secure legal aid funding for this appeal.
- [3] This application is governed by s. 679 of the Criminal Code. To obtain bail, Mr. Hagen must first be granted leave to appeal: s. 679(1)(b). Then, by virtue of s. 679(4), he must establish on a balance of probabilities that: (a) his appeal has sufficient merit such that it would cause unnecessary hardship if he were detained; (b) he will surrender into custody in accordance

with the terms of his release; and (c) his detention is not necessary in the public interest: *R. v. Oland*, 2017 SCC 17 at para. 19, [2017] 1 S.C.R. 250. The public interest criterion has two components: (a) public safety; and (b) public confidence in the administration of justice: *Oland* at paras. 23-26.

- [4] The Crown accepts Mr. Hagen will surrender into custody in accordance with the terms of release and that public safety concerns can be met by the imposition of adequate conditions. The Crown's opposition to release focuses on merit and hardship. It says Mr. Hagen's request for a CSO has essentially no merit. It further says that even if this Court were to reduce the ten-month term, it is unlikely Mr. Hagen would be released before the end of April. That submission is based, in part, on the fact that at the outset of this hearing the appeal was set for April 20, 2021.
- [5] For the following reasons, bail is granted.

Background to the Sentencing

- [6] On November 17, 2018, the police seized Mr. Hagen's cellular telephone and other electronic-data storage equipment. Mr. Hagen was arrested and admitted child pornography was stored on those devices. He was released on an undertaking with strict conditions. On November 22, 2018, he breached a condition of the undertaking when he sent an email to a friend, telling her what had happened and stating he was suicidal.
- [7] The devices seized from Mr. Hagen contained a total of 605 child-pornography images, including duplicates; there were 85 videos and 139 deleted videos. The images were of male and female children between the ages of four and fifteen. None of the images involved violent acts.
- [8] On October 16, 2019, Mr. Hagen pleaded guilty to possession of child pornography and breaching a bail condition. A presentence report and a psychiatric risk assessment were ordered. Because of the COVID-19 pandemic, sentencing did not take place until November 20, 2020, at which time Mr. Hagen was 36 years old.
- [9] The presentence report (dated February 28, 2020), which contains a Gladue component (see *R. v. Gladue*, [1999] 1 S.C.R. 688), includes the following information:
- Mr. Hagen is of Indigenous heritage; his father is Tsimshian and attended residential school. Mr. Hagen has no memory of being involved in Indigenous cultural activities.
 - When Mr. Hagen was approximately eight years old he was sexually abused by a couple who were neighbours. The couple forced Mr. Hagen and their own children to perform sexual acts in front of a camera. This abuse carried on for about a year. After the couple moved away, another family moved into the house in question. Mr. Hagen became friends with their son. This boy's parents enjoyed watching pornography on the television. Mr. Hagen recalls that on sleepovers, the boy's mother would put pornography on and touch him inappropriately.

- Mr. Hagen has expressed remorse and regret for his actions. Shortly after being charged he reached out for counseling. He saw a psychiatrist and continues to see a mental health clinician.

- Mr. Hagen could not easily explain his actions, other than he believes there are child-pornography images of himself on the Internet from when he was sexually abused and, in a way, he was searching for himself.

[10] The risk assessment report (dated February 28, 2020) was written by a psychiatrist who interviewed Mr. Hagen by means of a video link. Mr. Hagen refused to fully participate in the assessment. That psychiatrist reviewed an assessment written by another psychiatrist in August of 2019. The 2020 report contains the following diagnosis according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5):

1. Adjustment disorder with mixed anxiety and depressive feature in remission on medication.
2. Cannabis Use.
3. Rule out Pedophilic Disorder (least likely since he has not acted on it) vs might have Pedophilic Sexual Interest.
4. Rule Learning Disability.

Sentencing Positions and Reasons for Judgment

[11] The Crown sought a sentence in the range of six to fifteen months' imprisonment to be followed by three years' probation. It relied principally on R. v. Alexander, 2019 BCCA 100 at para. 37, wherein that range was said to be appropriate for first-time offenders. Mr. Alexander was found in possession of approximately 5,700 child-pornography images and 400 videos. The children involved ranged from toddlers to 13 year olds. The conduct depicted included sexual assault of children by adults, bestiality, and bondage. Mr. Alexander, who was 28 at the time of sentencing, had no criminal record. In dismissing Mr. Alexander's appeal, this Court upheld a sentence of eight months' imprisonment followed by 18 months' probation.

[12] Mr. Hagen sought a CSO. In support of that submission he referred to, among other things, his Indigenous heritage, the fact that he had been sexually assaulted as a child, and the fact that he had started counseling on his own.

[13] After reviewing the facts and several sentencing cases, the sentencing judge began his analysis by referring to the principles of sentencing set out in the Criminal Code. He then listed the presence or absence of certain aggravating and mitigating factors.

[14] In regard to aggravating factors, the judge referred to the following:

- there was no related criminal record;
- the offence did not involve production or distribution;

- the child-pornography collection was "moderate";
- the images did not involve violent activity; and
- the risk assessment indicated Mr. Hagen may have pedophilic orientation or interest, but that cannot be confirmed.

[15] With respect to mitigating factors, the judge referred to the following:

- Mr. Hagen was not a youthful offender;
- he admitted the offence upon arrest; voluntarily undertook counseling and told the probation officer who prepared the pre-sentence report that he is agreeable to taking treatment and counseling; however, he refused to co-operate in the risk assessment;
- he expressed remorse to the probation officer and the mental health clinician; however, in his statement to the court he stressed the impact a sentence would have on him, not his remorse for the offence;
- as a result of being charged he lost his business and other employment; and
- he has been publicly shamed by local media coverage.

[16] After listing the above mentioned factors, the judge continued:

[18] Considering all of those factors, I conclude that Mr. Hagen's circumstances and that of the offence are not so unusual as to require a conditional sentence. Therefore, I sentence Mr. Hagen on the possession of child pornography to jail for 10 months and for one month concurrent for the breach of bail. In addition, there will be three years of probation to follow.

[17] The probation order includes conditions that prohibit Mr. Hagen from: (a) attending at public parks, swimming pools, and other similar locations where persons under the age of 16 years may reasonably be expected to be found; (b) communicating directly or indirectly with persons under 16, or being in the presence of such persons, except with the written permission of his probation officer; and (c) possessing any device capable of accessing any computer network or the Internet. In addition, a 20-year prohibition order with similar conditions was imposed under s. 161 of the Criminal Code. That order provides that Mr. Hagen can obtain permission to access a computer network or the Internet while in the presence of a person approved by his probation or parole officer.

Grounds of Appeal/Relief Sought

[18] Mr. Hagen's proposed grounds of appeal, as set out in his notice of application for leave to appeal, are:

1. The sentencing judge erred in law or principle by considering the incorrect legal test for the imposition of a conditional sentence order;

2. The sentencing judge erred in law or principle by failing to consider the Appellant's Indigenous background as a mitigating factor;
 3. The sentence imposed is demonstrably unfit;
 4. The sentencing judge erred in law or principle by imposing a prohibition order pursuant to section 161 of the Code, or, in the alternative by imposing vague, overbroad, or unreasonable conditions pursuant to that prohibition order;
 5. The sentencing judge erred in law or principle by imposing terms of probation that are unconstitutional, unreasonable, vague, or overbroad, including: a curfew; a prohibition on being "in the presence of any person under the age of 16 years"; and, a requirement that the Appellant upon request of a peace officer give any electronic device in his possession to a peace officer to search; and;
 6. Such further grounds as the transcript may reveal, counsel may advise, and this Honourable Court may consider.
- [19] Mr. Hagen seeks the following: (a) to have a CSO substituted for the imprisonment term or, alternatively, to have the ten months' imprisonment reduced; (b) to have the s. 161 prohibition order quashed or, alternatively, to have its quantum reduced or its conditions varied; and (c) to have the conditions of the probation order deleted or varied.
- [20] I note here that it appears the sentencing judge was not told Mr. Hagen has a dated conviction for possession of marihuana for the purpose of trafficking, for which he received a fine. No convictions are listed in the presentence report.

Analysis

- [21] For present purposes, only the challenge to the ten-month term of imprisonment is relevant.
- [22] As previously mentioned, the Crown accepts that Mr. Hagen is not a flight risk, that he will surrender as required, and that public safety concerns can be addressed by adequate conditions. I agree. Mr. Hagen has roots in the community, his sister who lives close to him is prepared to act as a surety, and, with the exception of the one incident that occurred shortly after his arrest, he abided by strict bail conditions for two years.
- [23] The test for granting leave is whether the appeal is not frivolous and has a reasonable chance of success: *R. v. Bui*, 2013 BCCA 90 at para. 11, 334 B.C.A.C. 212 (Chambers). If that test is met, then to obtain bail, an applicant must establish that "there is sufficient merit in the appeal that a fit sentence will be served before the appeal can be heard and a decision rendered": *R. v. Davies*, 2019 BCCA 235 at para. 14 (Chambers).
- [24] In my view, Mr. Hagen's appeal is not frivolous. My overall assessment is that it has a reasonable prospect of success. Even if a division of this Court is not persuaded that a CSO is a fit sentence, it may reduce the ten-month term. In this regard, of note is that in his

discussion of aggravating and mitigating factors the sentencing judge appears not to have taken into consideration Mr. Hagen's Indigenous heritage, or that he was sexually abused as a child. As well, the judge's statement that the circumstances of the offence and the offender were "not so unusual as to require a conditional sentence", on its face, is not in accordance with the test for a CSO set out in s. 742.1 of the Criminal Code: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61.

[25] With respect to merit/hardship, the Crown submits that in light of what this Court has said with respect to the range of sentence for child pornography in *Alexander* and *R. v. Swaby*, 2018 BCCA 416, 367 C.C.C. (3d) 439, leave to appeal on another ground ref'd [2019] S.C.C.A. No. 17, there is no reasonable prospect that this Court would vary Mr. Hagen's sentence to a CSO. The Crown further submits that as the appeal has been expedited, even if Mr. Hagen were to succeed in having the ten-month term reduced--which the Crown says is highly unlikely--such a reduction would not result in his spending more time in custody than otherwise required. In this regard, the Crown notes that, in most cases, an offender will be released on statutory release after serving two thirds of their sentence.

[26] Assuming, as the Crown does, that this Court renders its decision very shortly after it hears this appeal on April 20, 2021:

- if the appeal is dismissed, then Mr. Hagen will likely be released in mid-June;
- if the sentence is reduced to eight months, then Mr. Hagen will likely be released in April; and
- if the sentence is reduced to six months or less, then Mr. Hagen will spend more time in custody than required by what this Court determines to be a fit sentence.

[27] My difficulty with the Crown's argument is that it involves speculation both as to what remedy the Court may grant and when it will render its decision. I consider that Mr. Hagen has an arguable appeal and that should he succeed in having the ten-month term reduced, there is a real possibility he could spend more time in custody than required by what this Court determines is a fit sentence.

[28] With respect to public confidence in the administration of justice, while this case is close to the line, I do not think Mr. Hagen's release would erode or diminish that confidence. Although the public has an interest in the immediate execution of sentences imposed on those who have been convicted, it also has an interest in judgments being reviewed and any errors corrected. Given Mr. Hagen has an arguable appeal, does not pose a flight or public safety risk, and may have his appeal rendered moot if he is not released, I have concluded reviewability outweighs enforceability.

[29] In the result, leave to appeal is granted. As for the terms of release, the parties have provided helpful submissions. Based on those submissions, I order Mr. Hagen released upon his entering into a recognizance in the amount of \$5,000 with one surety, being his sister, Sapphira Hagen, with the following conditions:

1. You must keep the peace and be of good behaviour.
2. You must report in person to the bail supervisor at the Prince Rupert Community Corrections office, 132 1st Avenue W., Prince Rupert, B.C. within two business days of your release and thereafter as required by the bail supervisor, at a frequency and in a manner as directed by your bail supervisor.
3. You must reside at [the address listed in para. 14 of Mr. Hagen's affidavit filed January 28, 2021] and not change your place of residence without the prior written permission of your bail supervisor.
4. When first reporting to your bail supervisor, you must provide your telephone number. You may not change your telephone number without notifying your bail supervisor in writing at least seven days in advance of any change.
5. Within two business days of your release you must attend at the Royal Canadian Mounted Police Detachment, 100 6th Avenue W., Prince Rupert, B.C. and surrender all your travel documents, including any passport(s), Nexus card(s), travel visas, or enhanced driver's licenses to a peace officer, and you must not obtain or possess any travel document thereafter.
6. You must not leave the Province of British Columbia unless you have the written permission of your bail supervisor. You must carry the written permission with you at all times if you are out of the Province.
7. You must not possess or use any device capable of accessing any computer network or the Internet, except:
 - (a) In the immediate presence of your bail supervisor;
 - (b) In the immediate presence of Sapphira Hagen; or
 - (c) At your lawful place of employment, you may use a computer or other device that is owned or controlled by your employer, other than yourself, for the purpose of your lawful employment and with the permission of your employer after your employer has confirmed with your bail supervisor that they have read a copy of this order.
8. You must not have any contact or communication, directly or indirectly, or be alone in the presence of any person you know to be or who reasonably appears to be under the age of 16 years, except:
 - (a) With the prior written permission of your bail supervisor. Such permission is to be given only for compelling reasons. You must carry the permission with you at all times; or
 - (b) In the immediate presence of Sapphira Hagen.

9. You must not go to any public park, public swimming area, community centre, or theatre where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, or playground, except:
 - (a) With the prior written permission of your bail supervisor. Such permission is to be given only for compelling reasons. You must carry the permission with you at all times when you are in a prohibited area; or
 - (b) In the immediate presence of Sapphira Hagen.
10. You must not engage in any volunteer work or employment that would bring you in contact with persons under the age of 16 years without the written permission of your bail supervisor. You must carry the permission with you at all times you are engaged in the activity.
11. You must surrender yourself into custody at the Sheriff's Office at the courthouse, 100 Market Place, Prince Rupert, B.C. at 9:00 a.m. on Friday, July 30, 2021, or on the date set for the delivery of judgment on your appeal, whichever date first occurs.

"The Honourable Mr. Justice Frankel"

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